Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

WILLIAM SILVA,

Petitioner,

vs.

JAY RAM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where Respondent was indicted charging sexual assault of a male child not in Respondent's custody; and therefore Petitioner suspected Respondent was sexually abusing minor children in Respondent's custody, is Petitioner entitled to qualified immunity under 42 U.S.C. § 1983, when pursuant to Hawaii statute, he acted in concert with State child protective services personnel to take the children into temporary protective custody for the statutory period?

2. Did the trial court err in denying qualified immunity via summary judgment to Petitioner based upon perceived disputes as to material facts, despite Petitioner's claim that the underlying claim of constitutional right is not clearly established and that precise factual clarity is therefore immaterial?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, William Silva, respectfully prays that a writ of certiorari issue to review the July 2, 1997, opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated July 2, 1997, is reported at 118 F.3d 1306, and is reprinted in the Petition Appendix ("App.") beginning at App. p. 1a. The Ninth Circuit's denial of Petitioner's request for rehearing and suggestion for rehearing *en banc*, dated August 14, 1997, is reprinted in the App. at p. 13. The unreported opinion of the United States District Court for the District of Hawaii, dated July 25, 1994, is reprinted commencing at App. p. 17.

STATEMENT OF JURISDICTION

Petitioner seeks review of the Ninth Circuit Court of Appeals' opinion dated July 2, 1997, petition for rehearing and suggestion for hearing *en banc* denied August 14, 1997.

The United States Supreme Court has jurisdiction to review cases from the Circuit Court of Appeals by virtue of 28 U.S.C. § 1254.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without the process of law, nor shall private property be taken for public use, without just compensation.

Section 587-22, Hawaii Revised Statutes ("HRS"), provides:

> **Protective custody by police officer without court order.** (a) A police officer shall assume protective custody of a child without a court order and without the consent of the child's family regardless of whether the child's family is absent, if in the discretion of such police officer, the child is in such circumstance or condition that the child's continuing in the custody or care of the child's family presents a situation of imminent harm to the child.
>
> (b) A police officer who assumes protective custody of a child immediately shall complete transfer of protective custody to the department by presenting physical custody of the child to the department, unless the child is

or presently will be admitted to a hospital or similar institution, in which case the police officer immediately shall complete transfer of protective custody to the department by so informing the department and receiving an acknowledgment from the hospital or similar institution that it has been informed that the child is under the temporary foster custody of the department.

(c) Upon the completion of the transfer of protective custody of a child by a police officer to the department, the department shall automatically assume temporary foster custody of the child.

Section 587-24, Hawaii Revised Statutes, provides:

Temporary foster custody without court order. (a) When the department receives physical custody of a child from the police pursuant to section 587-22(b), the department shall assume temporary foster custody of a child without an order of the court and without the consent of the child's family regardless of whether the child's family is absent, if in the discretion of the department the child is in such circumstance or condition that the child's continuing in the custody or care of the child's family presents a situation of imminent harm to the child.

(b) Upon assuming temporary foster custody of a child under this chapter, the department promptly shall make every reasonable effort to inform a legal custodian of the child of the actions taken concerning the child; provided that the department may withhold such information from the child's family concerning the

child as, in its discretion is deemed to be in the best interests of the child.

(c) Upon assuming temporary foster custody of a child under this chapter, the department shall place the child in emergency foster care, unless the child is admitted to a hospital or similar institution, while it conducts an appropriate investigation.

(d) Any physician licensed or authorized to practice medicine in this State presented with a child who is under the temporary foster custody of the department shall perform such an examination of the child, with or without the consent of the child's family, as is required in order to determine the nature and extent of any imminent harm, or threatened harm to the child.

(e) Within two working days, excluding Saturdays, Sundays, or holidays, after the date of its assumption of temporary foster custody, the department shall:

(1) Relinquish its temporary foster custody and return the child to the child's legal custodian and proceed pursuant to section 587-21(b)(1), (2), or (4);

(2) Continue its assumption of temporary foster custody of the child with the child being voluntarily placed in foster care by the child's legal custodian and proceed pursuant to section 587-21(b)(2) or (4); or

(3) Continue its assumption of temporary foster custody of the child and proceed pursuant to section 587-21(b)(3).

STATEMENT

1. This case is one of a legion of like cases addressed by most circuit courts of appeal and by innumerable district courts. Other than the instant case, it is not an overstatement to declare that, with virtual unanimity, all other circuits have extended the benefit of the qualified immunity doctrine to state and municipal officials who behaved as Petitioner did.

Thus, inexplicably and intransigently, the Ninth Circuit stands alone.

Specifically, each court other than the Ninth Circuit in the case at bar has held that the constitutional right of "family integrity" is so amorphous and undefined in its particulars and parameters so as to immunize governmental actors who take temporary physical custody of minor children when such officers suspect child abuse is occurring.

Accordingly, Petitioner, William Silva, a Hawaii County Police Department lieutenant, acting in concert with Hawaii State Human Services Child Protective Services personnel and as authorized by §587-22, HRS, took Respondent's children into custody for the period statutorily authorized, i.e., no more than two "working days, excluding Saturdays, Sundays, or holidays."

Respondent filed an action in the United States District Court for the District of Hawaii asserting via 42 U.S.C. §1983 violations of procedural and substantive due process and supplemental State tort claims.

Following a flurry of discovery, both Petitioner Silva and the State's child protective services worker,

Kamahele, moved for summary judgment, asserting that plaintiff's federal constitutional claims were incompatible with Petitioner and Kamahele's entitlement to qualified immunity.

The district court denied Petitioner Silva's motion, yet, oddly enough, granted that of Kamahele, reciting that material issues of fact precluded granting Silva's motion.

Petitioner Silva appealed the district court's denial of his qualified immunity motion to the Ninth Circuit Court of Appeals, which agreed in a truncated opinion with the district court's reasoning as to Petitioner Silva. It concluded also that the district court had wrongly granted Kamahele's claim of entitlement to qualified immunity.

Lastly, the Ninth Circuit denied Petitioner Silva's request for rehearing and suggestion for rehearing *en banc*.

Petitioner maintains that the issue of clearly established law and consequent entitlement to qualified immunity is not determined by precise factual ascertainment. That is to say, when constitutional norms are not clearly established, varying versions of events are immaterial, provided "core" facts are undisputed.

In the instant case, Petitioner argues that the "core" fact that Respondent was under indictment charged with sexually abusing a male child, not in his custody, provided suspicion adequate to entitle Petitioner to qualified immunity based upon his participation in taking temporary protective custody of Respondent's minor children

as authorized by Hawaii statute, i.e., §587-24(e), HRS, eight days following the indictment.

REASONS FOR GRANTING THE WRIT

This Petition results from the remarkably diverse path chosen by the Ninth Circuit Court of Appeals in the face of a virtually unanimous deluge of contrary holdings in like circumstances in the other circuits.

Rather than acknowledge the host of divergent reported opinions elsewhere and declare them faulty or misguided, the Ninth Circuit opinion ignores them.

Moreover, the opinion is entirely discordant and inconsistent with this court's opinion in *Behrens v. Pelletier*, 516 U.S. ___, 116 S.Ct. 834, 113 L.Ed.2d 773 (1996), which the court neither cites nor analyzes.

Equally remarkably, the opinion is at odds with decisions of the self-same court. Earlier reported opinions quite simply cannot be reconciled with the instant holding.

The United States Supreme Court has never addressed the scenario here presented. In comparable cases where others in Petitioner's shoes have been accorded qualified immunity in other circuits, plaintiffs' petitions for certiorari have been denied. *See Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994).

I. QUALIFIED IMMUNITY IS THE NORM WHEN MUNICIPAL AND STATE OFFICIALS TAKE TEMPORARY CUSTODY OF MINOR CHILDREN WHEN ABUSE IS SUSPECTED.

As well-articulated in *Doe v. Louisiana*, 2 F.3d 1412, 1416 (5th Cir. 1993):

> Both the plaintiffs and defendants cite to *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), *Hodorowski*, and *Frazier*.[1]
>
> Although we agree with the plaintiffs that those three cases recognize a constitutional right of family integrity under the Fourteenth Amendment we disagree that those cases establish that a parent's liberty interest in family integrity is a clearly established constitutional right.

Contrary to the lower courts' determinations, each of the federal circuits which has considered the matter has held that there is no clearly established right in the instant context.

In *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), the court dealt with a scenario with many distinct parallels to the case at bar.

The court held sheriff's deputies to be among those entitled to qualified immunity as a matter of law where plaintiff's minor children were seized following plaintiff's arrest for abusing other children. 810 F.2d at 1463.

---

[1] *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988); and *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992).

The court acknowledged the constitutional underpinnings of the integrity of the family unit and parent-child custody. 810 F.2d at 1462.

Nevertheless, the right is not absolute, and is subject to a "balancing test." *Id.*

That being so, the court went on to recite that such rights, "subject to a balancing test, . . . can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." [Citing *Benson v. Allphin*, 786 F.2d 266, 276 (7th Cir.), *cert. denied*, 479 U.S. 848, 107 S.Ct. 172, 93 L.Ed.2d 109 (1986).] *Id.*

Continuing, the court recited that,

> If law enforcement personnel who have at least arguable probable cause to believe that adults have been molesting children are not entitled to reasonable belief that the adults may pose a danger to their own children, then the law was (and is) not clearly established on this point. There is certainly no available legal precedent to this effect.

810 F.2d at 1463.

> We therefore conclude that there was, at a minimum, a legitimate question concerning the legality of hastily removing minor children from the plaintiff's custody upon the arrest of one or both parents for sexually abusing other children,. . . .

Id.

In the case at bar, the grand jury indictment establishes that probable cause existed to believe Respondent

sexually abused another minor child. That being so, consonant with the Eighth Circuit's view, there is no "clearly established" right violated here by temporarily removing Respondent's children for two or three days for inquiry eight days following return of the indictment.

All this being so, the lower courts manifestly erred in concluding that Petitioner Silva was not entitled to summary judgment in his favor as a matter of law based upon qualified immunity.

Indeed, in *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989), contrary to its resolution of the instant case, the court emphasized that:

> [I]n 1986, there was no binding Ninth Circuit or Supreme Court precedent which clearly established when state officials could or could not take a child into temporary protective custody.

Moreover, *Baker* cites both *Myers v. Morris* and *Benson v. Allphin, supra*, evidently for the proposition expressed in those cases that "a right . . . subject to a balancing test . . . can rarely be considered 'clearly established'. . . . "*Id.*

Santosky and like cases were recited as "distinguishable because they involved a 'state's attempt to sever *permanently* the parent-child relationship,' " citing *Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988) and indicating that this was one "principle which guides us in the present case." 887 F.2d at 188.

Moreover, the *Baker* court was unable to discern from decided cases "what kind of situation justifies emergency

protective custody without a predeprivation hearing, and more important, what does not." *Id.*

Similarly, *see Robinson v. Via*, 821 F.2d 913, 920-23 (2d Cir. 1987):

> [I]t . . . remains . . . well established that officials may temporarily deprive a parent of custody in "emergency" circumstances "without parental consent or a *prior* court order."

821 F.2d at 921, citing cases.

And *see Fittano v. Klein*, 788 F.Supp. 1451, 1458 (N.D.Ill. 1992):

> The law concerning child abuse workers and children who may have been sexually abused is no clearer today than it was in 1984 and 1985 when the Eighth Circuit decided *Myers*. Because the law in this area is not clearly established, defendant Klein is entitled to qualified immunity for her conduct.

Because of the amorphousness of the constitutional right at issue, vast latitude is accorded state actors in affecting the interests of persons asserting violation of their rights. What is critical to understand is that, in the present context, "questions of qualified immunity turn on the status of legal norms and not the sufficiency of the factual allegation." *Landstrom v. Illinois Dep't of Children and Family Serv.*, 892 F.2d 670, 675 (7th Cir. 1990); *Doe v. State of Louisiana*, 2 F.3d 1412, 1416 (5th Cir. 1993). "[F]act issues as to precisely what the defendant's course of conduct was . . . do not preclude a grant of summary judgment premised on . . . qualified immunity *if the legal norms allegedly violated were not clearly established. . . .* "

Swint v. City of Wadley, Ala., 5 F.3d 1435, 1442 (11th Cir. 1993). (Emphasis added.)

In the case at bar, Petitioner Silva, a lieutenant of police, acted to order that the Respondent's children and a child placed with him in anticipation of adoption be taken into "protective custody." This followed Respondent's indictment eight days earlier by the Third Circuit Court Grand Jury charging sexual abuse of another male minor child who had lived in Respondent's home, a felony. Suspected imminency of harm to the children does not require a frantic telephone call reporting that Respondent is *in flagrante delicto* with a child.

All discoverable reported authority unanimously holds that, despite the existence of an ill-defined right to family integrity found within substantive due process, qualified immunity shields governmental officials who interfere with the right ostensibly to protect minor children. *See, e.g., Doe v. State of Louisiana*, 2 F.3d 1412 (5th Cir. 1993); *Fittanto v. Children's Advocacy Center*, 836 F.Supp. 1406 (N.D.Ill., E.D. 1993); *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988); *Frazier v. Bailey*, 957 F.2d 920, 925 (1st Cir. 1992); *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993); *Kiser v. Garrett*, 67 F.3d 1166 (5th Cir. 1995).

And *see Foy v. Holston*, 94 F.3d 1528, 1534-35 (11th Cir. 1996) (removal of children from home by social workers is "arguably proper . . . even if . . . motivated by substantial part by unlawful motives [and, hence], objectively reasonable for the purposes of qualified immunity.")

As related in *Frazier*, lower courts have observed the difficulties of finding a "clearly established" constitutional right in the context of family relationships. *See*

Landstrom v. Illinois Dep't of Children & Family Serv., 892 F.2d 670, 675-78 (7th Cir. 1990); *Baker v. Racansky*, 887 F.2d 183, 178-89 (9th Cir. 1989); *Hodorowski v. Ray, supra*, 844 F.2d at 1216-17; *Myers v. Morris*, 810 F.2d 1437, 1462-63 (8th Cir. 1987), *cert. denied*, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987). These cases focus on two concerns: (1) the difficultly of alleging a right with sufficient particularity; and (2) the qualified nature of all rights in this area.

As the court in *Frazier* recited:

> We agree with other courts that while there may be a due process right of "familial integrity" of some dimensions, the dimensions of this right have yet to be clearly established. Moreover, to the extent it is well-defined, the liberty interest *is* not absolute but rather balanced against the governmental interest. In such circumstances we find that Frazier has failed to show that the steps taken . . . in responding to the allegations of sexual abuse "violated the nebulous right of family integrity." *Hodorowski*, 844 F.2d at 1217. Because the right to family integrity has not been so particularized as to put defendants on notice that their conduct was unlawful, [the officials] are entitled to qualified immunity as a matter of law.

957 F.2d at 931.

Hodorowski recognized that temporary custody of children by government officials without a prior court order was governed by the qualified immunity doctrine. 844 F.2d at 1212. There the court remarked that "it would be a mistake to conclude that . . . appellant should have

known that taking the Hodorowski children into temporary custody violated a constitutional right." 844 F.2d at 1217.

"In reaching that conclusion, we noted the nebulous nature of the right to family integrity, and held that right was not sufficiently particularized that a reasonable official would understand that his conduct violated that right." *Id.* citing *Doe v. Louisiana, supra,* 2 F.3d at 1417.

As the Fifth Circuit stated in *Hodorowski v. Ray,* 844 F.2d 1210, 1217 (5th Cir. 1988):

> [I]n the absence of any more fact-specific authority, we do not think [the officials] should have known that . . . removing the . . . children from the home violated the nebulous right of family integrity.
>
> The Ninth Circuit itself put it this way: Taken as a group, the . . . cases offer little insight as to what circumstances do *not* justify taking a child into protective custody without a prior hearing. *Baker v. Racansky,* 887 F.2d 183, 188 (9th Cir. 1989). (Emphasis in original.)

"The determination of whether [a] right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters" presents a "pure question of law." *Romero v. Kitsap County,* 931 F.2d 624, 627-28 (9th Cir. 1991). *See also Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (qualified immunity is "essentially [a] legal question.)"

Indeed, this case involves only the temporary custody of children by the State, not a permanent termination of parental rights. This factor, without more, should

have prevented the trial court from determining that Petitioner's conduct violated clearly established law. *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988). Furthermore, assuming the existence of a constitutionally protected liberty interest in this context, this case nonetheless would involve the difficult balancing of a family's right to autonomy against the State's interest in protecting minor children from abuse, to determine what procedural protections are due. *See Baker*, 887 F.2d at 187. If the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, rarely can the right or its protections be deemed "clearly established," at least in the absence of closely corresponding factual and legal precedent. *See Benson v. Allphin*, 786 F.2d 266, 276 (7th Cir. 1986). Neither Respondent nor the trial court found such a precedent.

The Ninth Circuit's odd view that absent evidence of "imminent danger" to Respondent's minor children, qualified immunity did not apply is not shared by any of the other numerous decisions on point. 118 F.3d at 1310, App. at 10.

In sum, reported cases provide little insight as to what circumstances do not justify taking a child into custody without a prior hearing or a host of other procedural protections. Accordingly, Respondent failed to carry his burden of establishing the violation of a "clearly established" federal statutory or constitutional right, and the lower courts' contrary conclusions are manifestly wrong.

II. WHERE CONSTITUTIONAL NORMS ARE NOT CLEARLY ESTABLISHED FACTUAL DISPARITIES ARE LARGELY IMMATERIAL TO QUALIFIED IMMUNITY ENTITLEMENT.

The wrong track taken by the district court and followed in turn by the Ninth Circuit Court of Appeals can be largely attributed to confusion engendered by this Court's decision in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). See, generally, Lieberman, *"Note, Post-Johnson v. Jones Confusion: The Granting Of Back-Door Qualified Immunity,"* 6 B.U. Pub. Int. L. J. 567 (1997).

"The district court denied Silva summary judgment because the pretrial record indicated that genuine issues of material fact existed. This ends our inquiry with regard to Silva's appeal." 118 F.3d at 1311. App. at 10. Such *ipse dixit* termination of inquiry is patently erroneous, since in *Behrens v. Pelletier*, 516 U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), as the Ninth Circuit has acknowledged, it was made crystal clear that whether the federal right allegedly infringed was clearly established is immediately appealable. *Somers v. Thurman*, 109 F.3d 614, 616 n. 3 (9th Cir. 1997).

Viewed in the light most favorable to Respondent, uncontroverted facts established entitlement to qualified immunity. Respondent was indicted for sexually abusing a 14-year-old boy living in Plaintiff's foster home, and as a result of the indictment, Petitioner and other police officers and State CPS workers removed Plaintiff's five adopted minor children, all of whom are boys under the

age of 17, from his custody and put them into temporary protective custody.

Respondent did not controvert that he had been so indicted. That being so, all other factual controversies are immaterial to the qualified immunity issue. *See, e.g., Myers v. Mooris,* 810 F.2d 1437, 1463 (8th Cir. 1987):

> If law enforcement personnel who have at least arguable probable cause to believe that adults have been molesting children are not entitled to reasonable belief that the adults may pose a danger to their own children, then the law was (and is) not clearly established on this point. There is certainly no available legal precedent to this effect.

810 F.2d at 1463.

> We therefore conclude that there was, at a minimum, a legitimate question concerning the legality of hastily removing minor children from the plaintiff's custody upon the arrest of one or both parents for sexually abusing other children,. . . .

Id.

In the case at bar, the grand jury indictment establishes that probable cause existed to believe Respondent sexually abused another minor child. That being so, consonant with the Eighth Circuit's view, there is no "clearly established" right violated here by temporarily removing Respondent's children for the statutory period of inquiry.

The upshot of *Johnson v. Jones'* prohibition of consideration of evidentiary sufficiency respecting determinations of qualified immunity has not stripped appellate courts of

their perceived capacity to decide evidentiary issues that are part and parcel of "core" qualified immunity issues. *See, e.g., Cottrell v. Caldwell,* 85 F.3d 1480 (11th Cir. 1996): "*Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an abstract issue of law relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was clearly established." 95 F.3d at 1485, quoting *Behrens v. Pelletier,* 516 U.S. ___, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996). As summarized in *Behrens,* "*Johnson* reaffirmed that summary-judgment determinations *are* appealable when they resolve a dispute concerning an 'abstract issue of law' relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly established.' " *Id.,* 516 U.S. ___, at ___, 116 S.Ct. at 842. (Emphasis in original.) Similarly, *Jackson v. Long,* 102 F.3d 722, 726-27 (4th Cir. 1996). Oddly, and significantly, the Ninth Circuit fails to cite, let alone discuss *Behrens* as it impacts qualified immunity appeals.

This case, unlike *Johnson v. Jones,* has to do with whether Petitioner could have believed that the grand jury indictment of Respondent charging him with sexual abuse of a male child provided lawful cause to detain other children temporarily as sanctioned by Hawaii statute to seek to determine whether they had likewise likely been abused. This argument raises the "core" qualified immunity issue and is, therefore, immediately appealable under *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Indeed, *Johnson* has not proven an obstacle to appellate review regardless of disputed facts where the "core" qualified immunity facts are clear. *See, e.g., Dolihite v.*

Maughon By And Through Videon, 74 F.3d 1027, 1033-35 (11th Cir. 1996), and accompanying footnote 3 therein.

As there recited,

> Even if we are incorrect in our conclusion that the identification of the precise acts and knowledge of each appealing public official is part and parcel of the core qualified immunity issue, we are satisfied that it would be "inextricably intertwined" with the core issue, and thus would be within our pendent appellate jurisdiction. *See Swint v. Chambers County Comm'n.*, 514 U.S. 35, ___, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60 (1995) (also suggesting that pendent issue jurisdiction may exist where review of the pendent issue is necessary to ensure a meaningful review of the qualified immunity issue); *Johnson*, 515 U.S. at ___, 115 S.Ct. at 2159 (suggesting that pendent issue jurisdiction of even evidence insufficiency issues may exist). When an appealing public official presents the core qualified immunity issue, we believe that we have pendent appellate jurisdiction of other issues presented by such official if the other issues are "inextricably intertwined" with the core issue. *See Blue v. Koren*, 72 F.3d 1075, 1084 n. 6 (2d Cir. 1995) (finding that the district court's ruling that a genuine issue of material fact remained with respect to the qualified immunity issue is reviewable under the court's pendent jurisdiction where it is intertwined with the constitutional claim and is necessary for a meaningful review of whether the district court applied the appropriate standard). Every circuit to address *Swint's* reference to "inextricably intertwined" issues has concluded that such pendent jurisdiction exists. *See, e.g., Kincade v.*

> *City of Blue Springs*, 64 F.3d 389, 394-95 (8th Cir. 1995); *Kaluczky v. City of White Plains*, 57 F.3d 202, 206-07 (2d Cir. 1995); *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995). In this case, even if the identification of the precise actions and knowledge of each appellant is not part and parcel of the core issue, as we believe it is, the above discussion conclusively demonstrates that the issue is "inextricably intertwined."

74 F.3d at 1034-35, n.3.

As remarked by Chief Judge Wilkinson of the Fourth Circuit, *Johnson v. Jones* is not "a decision that will doom the defense of qualified immunity once and for all." It is not intended "to essentially destroy interlocutory appeals under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)."

"*Johnson* [is] an important but limited decision which represents neither the termination of meaningful interlocutory review nor the demise of the qualified immunity defense." *Winfield v. Bass*, 106 F.3d 525, 535 (4th Cir. 1997) (*en banc*) (Wilkinson, Chief Judge, concurring).

In the instant case, the upshot of the circuit's opinion is to doom the qualified immunity defense in the Ninth Circuit. It is a rare case indeed where a civil rights plaintiff and defendant agree on all material facts. If the law is not clearly established, such factual disputes are unimportant if the "core" issue is clear.

CONCLUSION

The lower courts' decisions in this case are patently wrong. This court has not addressed the issues presented, despite their frequent appearance in the lower federal courts.

It is timely that this court address the matter so as to resolve a compelling need for uniformity.

The petition for certiorari should be granted.

DATED: Hilo, Hawaii, September 22, 1997.

Respectfully submitted,

STEVEN CHRISTENSEN
Deputy Corporation Counsel
County of Hawaii

Jay RAM, Plaintiff-Appellee,
v.
Winona RUBIN, in her capacity as Director of the Department of Human Services, State of Hawai'i, Defendant,
and
William Silva, Defendant-Appellant,
Jay RAM, Plaintiff-Appellant,
v.
Winona RUBIN, in her capacity as Director of the Department of Human Services; County of Hawaii, a municipal corporation; William Silva; Elsie Kamahele, John Does 1-10; Jane Does 1-10; Doe Corporations 1-10; Doe Partnership 1-10; Doe Joint Ventures 1-10; and Doe Governmental Entities 1-10, Defendants-Appellees.

Nos. 94-16508, 94-17185.

United States Court of Appeals,
Ninth Circuit,

Argued and Submitted June 10, 1996.

Decided July 2, 1997.

Father brought § 1983 action in state court against social worker and police officer, alleging that they removed father's children from his custody without prior notice or hearing. Defendants removed action to federal court and moved for summary judgment on qualified immunity grounds. The United States District Court for the District of Hawai'i, Alan C. Kay, J., granted summary judgment as a social worker, but denied it as to police officer. Appeal and cross-appeal were taken. The Court of appeals, Hug, Chief Judge, held that: (1) on officer's

cross-appeal, Court lacked jurisdiction to consider question of fact, i.e., whether evidence in pretrial record was sufficient to show genuine issue of fact for trial; (2) father sufficiently alleged violation of clearly established right; and (3) genuine issues of material fact existed as to whether reasonable officer in social worker's position could have believed that taking children into temporary custody was lawful.

Affirmed in part, reversed in part, and remanded.

Eric A. Seitz, Honolulu, HI, for Plaintiff-Appellee-Cross-Appellant Ram.

Thomas D. Farrell, Deputy Attorney General, Honolulu, HI, for State Defendants-Appellees.

Steven Christensen, Deputy Corporation Counsel, County of Hawaii, Hilo, HI, for Defendant County of Hawaii and Defendant-Appellant Silva.

Appeals from the United States District court for the District of Hawaii; Alan C. Kay, District Judge, Presiding. D.C. No. CV-93-00917-ACK.

Before: HUG, Chief Judge, SCHROEDER and HAWKINS, Circuit Judges.

HUG, Chief Judge:

In this civil rights action we must determine whether a social worker and a police officer who removed minor children from the custody of their father without prior notice or a hearing are immune from suit under the doctrine of qualified immunity. The district court entered summary judgment for the social worker and denied

summary judgment for the police officer. We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's summary judgment for the social worker and affirm the denial of summary judgment for the police officer.

I. Jurisdiction

Following allegations in January, 1992, by Z.D., a minor, that he was sexually abused by Jay Ram, Child Protective Services Crisis Unit ("CPS") began an investigation. No action was taken to remove Ram's five adopted sons and one foster son from his custody until October 22, 1993. On that date, Elsie Kamahele, acting in her capacity as the East Hawaii Social Services Section Administrator, and Lieutenant William Silva of the Hawaii County Police Department removed Ram's children from his custody without prior notice to Ram or a hearing as to the necessity for doing so. The children were released into Ram's custody on October 26, 1993, and Ram initiated this action in state court on November 23. Ram alleged, *inter alia*, that Kamahele and Silva, acting under the color of state law, deprived him of his constitutional rights in violation of 42 U.S.C. § 1983.

After removing the action to federal court, Kamahele and Silva moved for summary judgment on the basis of qualified immunity.[1] The district court denied Silva's

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[1] Actually, Kamahele moved for judgment on the pleadings. The district court treated the motion as one for summary judgment because it considered matters outside the pleadings.

motion for summary judgment, and he appeals. The district court granted Kamahele's motion, a decision that Ram now appeals. We must first determine whether and to what extent we have appellate jurisdiction over these appeals.

Silva's appeal is an interlocutory one. "We have jurisdiction to hear an interlocutory appeal from a denial of qualified immunity when the question involves a matter of law." *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996). Whether Ram has alleged the violation of a clearly established right is a question of law. *See Carnell v. Grimm*, 74 F.3d 977, 978 (9th Cir. 1996). To the extent that Silva's appeal requires the determination of a fact-related dispute, namely whether the evidence in the pretrial record is sufficient to show a genuine issue of fact for trial, we lack jurisdiction. *Johnson v. Jones*, 515 U.S. 304, ___-___, 115 S.Ct. 2151, 2153-54, 132 L.Ed.2d 238, 243 (1995). We therefore have jurisdiction only to determine whether the law governing Silva's conduct was clearly established.

Ram appeals the district court's entry of summary judgment for Kamahele. We have appellate jurisdiction of this appeal based upon the district court's entry of a final judgment under Federal Rule of Civil Procedure 54(b).

II. Background

As noted above, Z.D. accused Ram of sexually abusing him during a weekend visit to Ram's foster home. Z.D.'s allegations were referred to CPS in January, 1992. On January 27, 1992, CPS and the Hawaii County Police Department initiated a joint investigation. Z.D., in the first of two interviews, made no allegations of sexual

abuse. In the second interview, which was videotaped, Z.D. accused Ram of touching his penis, but gave inconsistent versions of the incident and, ultimately, stated that it happened "by accident."

The police investigator reported to Silva that Z.D. made no allegations of abuse in the first interview and, in the investigator's opinion, Z.D.'s father was prompting Z.D. The police investigation was suspended. CPS also closed its investigation, labelling the allegations unconfirmed.[2]

In September, 1992, a second investigation was initiated.[3] Gerald Higa, the only CPS investigator who had no prior contact with Ram, was assigned to the case. On October 21, he interviewed Ram who emphatically

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[2] An unconfirmed disposition means that, based on the information obtained in the investigation, in the investigator's opinion, the allegations cannot be confirmed.

[3] It is unclear why a second investigation took place. Kamahele testified at her deposition that Maui CPS, which also conducted an investigation, had confirmed Z.D.'s allegations. She thus felt that a second investigation was necessary. The pretrial record, however, is devoid of any evidence that indicates the scope of that investigation, and of any document that indicates why Maui CPS confirmed the allegations.

Ram alleges, to the contrary, that the second investigation was initiated in response to external pressure imposed by Z.D.'s father. On September 10, a California social worker contacted CPS and reported that Z.D.'s father had contacted California officials (where Ram had previously lived) and accused CPS and the Hawaii County Police Department of covering-up Z.D.'s allegations. Also, on September 11, the office of a local politician called Silva and relayed a similar complaint lodged with that office by Z.D.'s father.

denied the allegations. The next day Higa interviewed Ram's children and each denied having witnessed the alleged incident, called Z.D. a liar, said that Z.D. misconstrued situations, and denied ever having been physically or sexually abused by Ram. Higa also contacted three of Ram's adult sons, each of whom were no longer living on Ram's farm. All three denied ever having witnessed sexual or physical abuse, and emphatically stated that Ram had never abused them. Finally, Higa contacted two people whom he believed could provide information about Ram. Both contacts proved unremarkable. One person, who lived on Ram's farm for a year, even stated that she had never witnessed homosexual activities or sexual abuse on the farm.

Higa concluded his investigation with a written report, which was sent to Silva and available to Kamahele. The report provided that the credibility of Z.D. and his father was "very questionable" and that the evidence "overwhelmingly impugns [Z.D.'s] and his father's character and credibility." Higa also wrote that "there is no conclusive evidence or any strong indication" of abuse, and he considered the allegations unconfirmed. Higa's immediate supervisor signed the report, which was approved by the Hawaii Branch Administrator.

On October 14, 1993, over one-year after Higa was assigned to investigate Z.D.'s allegations, Ram was indicted on two counts of sexual abuse based on the accusations of Z.D. In June, 1994, the charges were dismissed.

After learning of the indictment, Silva contacted the director of CPS, Peggy Hilton, and told her that he

intended to take Ram's children into temporary protective custody in order to interview them and conduct a third investigation. Hilton refused to cooperate with Silva and questioned the need for taking the children into custody because no new allegations had been made and CPS twice before found the allegations unconfirmed.

Silva then contacted Kamahele, Hilton's supervisor. Silva explained that he intended to take the children into custody. He told Kamahele that he had received a report from the F.B.I. about Ram, but when she asked to see the report, he stated that a judge had signed a protective order and he could not disclose the report's contents. Silva, however, told Kamahele that she should contact California authorities and they might be able to provide some of the same information.

Kamahele did just that. Child Protective Service officials and a Tehama County police officer explained that, seven to ten years before, they had investigated allegations of physical abuse made against Ram. They faxed Kamahele copies of their reports, but it is unclear when she received those reports.

Kamahele and Silva took Ram's five adopted sons and one foster son into temporary protective custody without prior notice or a hearing on October 22, 1993. The children were interviewed and medical and psychological examinations were conducted to discover the possibility of sexual abuse. On October 26, Kamahele released the children into Ram's custody after the investigation indicated that the children were not in imminent danger of being sexually abused by Ram.

III. Discussion

Qualified immunity shields government officials from liability for civil damages if, in light of clearly established law governing the challenged conduct, the official objectively could have believed the conduct was lawful. *Carnell*, 74 F.3d at 978. When an official asserts qualified immunity, we apply a two-part analysis: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Id.*

A. Was the law governing Silva and Kamahele's conduct clearly established?

Ram bears the burden of showing that his right, which was allegedly violated when Kamahele and Silva took his children into temporary custody, was clearly established. *See Perkins v. City of West Covina*, 113 F.3d 1004, 1008 (9th Cir. 1997). In 1993, it was clear that a parent had a constitutionally protected right to the care and custody of his children and that he could not be summarily deprived of that custody without notice and a hearing, except when the children were in imminent danger. *Caldwell v. LeFaver*, 928 F.2d 331, 333 (9th Cir. 1991). Despite this, Silva and Kamahele argue that the parameters of this right were not sufficiently particularized to put them on notice that, under the circumstances of this case, their conduct infringed on Ram's rights. Stated somewhat differently, their argument is that "*Harlow [v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)] requires a constitutional right to be clearly established so that officials are on notice that their conduct is

in violation of that right." They contend that in 1993 it was not clear what circumstances justified, or failed to justify, taking minor children into protective custody without a hearing.

This argument is unavailing. In order to be clearly established for qualified immunity purposes, the contours of the asserted right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . . " *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Rather, the unlawfulness of the conduct need only have been apparent in light of preexisting law. *Id.*

Preexisting law clearly required Kamahele and Silva to provide Ram with notice and a hearing before they interfered with his custodial rights. *See Santosky v. Kramer*, 455 U.S. 745, 770, 102 S.Ct. 1388, 1403-04, 71 L.Ed.2d 599 (1982) (to terminate parental rights state must conduct a hearing under a constitutionally proper standard). The exception to this norm applies only if Ram's children were in imminent danger of harm. It was thus apparent that taking Ram's children into custody without notice and a hearing was unlawful unless there was imminent danger to the children. Accordingly, Ram has met his burden of showing that the right allegedly violated was clearly established at the time of his conduct. We turn next to the second step in qualified immunity analysis.

B. Under clearly established law, could a reasonable officer have believed that seizing Ram's children was lawful?

As a threshold matter, we reiterate that we do not have jurisdiction to determine the factual issue whether a reasonable officer could have believed that, based on the information known to Silva, seizing Ram's children was lawful. The district court denied Silva summary judgment because the pretrial record indicated that genuine issues of material fact existed. This ends our inquiry with regard to Silva's appeal.

Ram's appeal of the district court's grant of summary judgment for Kamahele, however, stands in a different posture. Ram's appeal is certified under Rule 54(b) as a final judgment and falls outside the scope of *Johnson v. Jones*. We must determine, therefore, whether a genuine issue of material fact exists regarding whether a reasonable officer in Kamahele's position could have believed that taking the children into temporary custody was lawful.

As stated above, normally, notice and a hearing are required before the children can be removed, even temporarily, from the custody of their parents. A state official cannot remove children from their parents unless the official has a reasonable belief that the children are in imminent danger. An indictment or serious allegations of abuse which are investigated and corroborated usually gives rise to a reasonable inference of imminent danger sufficient to justify taking children into temporary custody. *See Baker v. Racansky*, 887 F.2d 183 (9th Cir. 1989) (reversing district court's denial of summary judgment

where children were taken into protective custody two days after allegations of abuse and an investigation yielded evidence of abuse).

Here, however, Kamahele had much more information than an indictment. She acted on two-year old allegations that twice had been investigated and found unconfirmed. She took the children into custody against the advice of subordinates who were more familiar with the case than she was. Kamahele now questions the quality and thoroughness of the investigations and the objectiveness of her subordinates. Whether a social worker reasonably could have believed the Ram children were in imminent danger could well depend upon the testimony concerning the depth and integrity of the two investigations. We conclude, therefore, that genuine issues of material fact preclude summary judgment.

IV. Conclusion

We conclude that Ram alleged the violation of a clearly established right, i.e., that a parent has a constitutionally protected right to the care and custody of his children and he cannot be summarily deprived of custody without notice and a hearing except when the children are in imminent danger. Kamahele and Silva were not frontline investigators who were forced to make split-second determinations. Both were supervisors who acted on two-year-old allegations against the recommendations of investigators who were more familiar with the allegations of abuse. Their decision to take the Ram children immediately into custody without notice or a hearing, raises genuine issues of material fact as to whether a

reasonable state official could have believed that their actions were lawful.

The district court's denial of summary judgment for Silva in No. 94-16508 is **AFFIRMED.** In No. 94-17185, the district court's entry of summary judgment for Kamahele is **REVERSED.** Both cases are **REMANDED** to the district court for further proceedings consistent with this opinion.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAY RAM, Plaintiff-Appellee, v. WINONA RUBIN, in her capacity as Director of the Department of Human Services, State of Hawaii, Defendant, and WILLIAM SILVA, Defendant-Appellant.	No. 94-16508 D.C. No. CV-93-00917-ACK ORDER
JAY RAM, Plaintiff-Appellant, v. WINONA RUBIN, in her capacity as Director of the Department of Human Services; COUNTY OF HAWAII, a municipal corporation; WILLIAM SILVA; ELSIE KAMAHELE; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIP 1-10; DOE JOINT VENTURES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants-Appellees.	No. 94-17185 D.C. No. CV-93-00917-ACK (Filed Aug. 14, 1997)

Before: HUG, Chief Judge, SCHROEDER and HAWKINS, Circuit Judges.

The panel has voted to deny Defendant county of Hawaii and Defendant-Appellant William Silva's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-16508
CT/AG#: CV-93-00917-ACK

JAY RAM

Plaintiff – Appellee

v.

WINONA RUBIN, in her capacity as Director of the Department of Human Services, State of Hawaii; COUNTY OF HAWAII, a municipal corporation; ELSIE KAMAHELE; JOHN DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE JOINT VENTURES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10,

Defendants

and

WILLIAM SILVA

Defendant – Appellant

NO. 94-17185
CT/AG#: CV-93-00917-ACK

(Filed Aug. 25, 1997)

JAY RAM

Plaintiff – Appellant

v.

WINONA RUBIN, in her capacity as Director of the Department of Human Services; COUNTY OF HAWAII, a

municipal corporation; WILLIAM SILVA; ELSIE KAMAHELE, JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE JOINT VENTURES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10.

Defendants – Appellees

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Filed and entered July 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JAY RAM, Plaintiff, vs. WINONA RUBIN, et al. Defendants	)	CIV. NO. 93-00917 ACK

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

(Filed Jul. 25, 1994)

I. BACKGROUND

On October 14, 1993, Plaintiff was indicted for sexually abusing a minor living in Plaintiff's foster home. On October 22, 1993, state officials seized Plaintiff's five adopted minor children at school and placed them into the state's temporary protective custody.

On November 23, 1993, Plaintiff filed a complaint in state court against Defendants William Silva ("Silva") of the Hawaii County Police Department; Winona Rubin ("Rubin") in her capacity as director of the Department of Human Services (the "DHS"); Elsie Kamahele ("Kamahele") of the DHS; the State of Hawaii ("the State"); and the County of Hawaii (the "County"). In the complaint, Plaintiff asserts a federal cause of action under 42 U.S.C. § 1983 against Silva, Kamahele, and the County, as well as state causes of action against the DHS and the

County for unjustified interference with Plaintiff's custodial rights, negligent infliction of emotional distress, and intentional infliction of emotional distress. Plaintiff alleges that defendants knew the allegations against him for sexual abuse were not confirmed and that his minor children were not in immediate danger of being sexually abused by him.

On November 30, 1993, defendants removed Plaintiff's state-court complaint to federal court on the basis of federal question jurisdiction. Federal question jurisdiction is grounded in Plaintiff's § 1983 action.

On January 7, 1994, Silva filed a motion for partial summary judgment. On March 14, 1994, the DHS, Kamahele, the County and the State (collectively "State Defendants") filed a motion for judgment on the pleadings. These motions were set for hearing in April 1994, but were continued upon the parties' request. The State Defendants filed a supplemental brief and Plaintiff filed a further opposition to the supplemental brief. Silva decided not to file any supplemental papers, but, instead, to rely upon his original moving papers. The motions came on for hearing on July 18, 1994.

Through their motions, defendants first argue that Plaintiff's § 1983 claims against them must be dismissed because they are entitled to qualified immunity. Defendant Silva asserts that the seizure of Plaintiff's minor children was authorized under Haw. Rev. Stat. § 587-22, which provides in pertinent part that "[a] police officer shall assume protective custody of a child without a court order . . . in the discretion of such police officer . . . [if] a situation of imminent harm to the child [exists]." The

State Defendants assert the seizure was authorized under Haw. Rev. Stat. § 587-24(a), which provides in pertinent part that:

> When the department receives physical custody of a child from the police pursuant to section 587-22(b), the department shall assume temporary foster custody of a child without an order of the court . . . if in the discretion of the department the child is in such circumstance or condition that the child's continuing in the custody or care of the child's family presents a situation of imminent harm to the child.

Silva claims he had a reasonable belief that Plaintiff's children were in imminent harm of sexual abuse from Plaintiff, and, as a consequence, is entitled to qualified immunity. Kamahele claims that, under the facts and circumstances known to her, a reasonable official in her position would have believed that the children were in danger of imminent harm of sexual abuse, and therefore is entitled to qualified immunity.

Plaintiff opposes the motions, maintaining the defendants knew that the allegations of sexual abuse were not confirmed and that his minor children were not in imminent danger of sexual abuse. Plaintiff presents evidence in support of his contentions.

In addition to qualified immunity, the State Defendants claim they are protected by absolute immunity because their decision to seize Plaintiff's children was in connection with an ongoing child dependency proceeding. Plaintiff rejects this claim by arguing absolute immunity does not apply to any actions taken before the initiation of these proceedings.

Lastly, the State Defendants argue Plaintiff's state causes of action against them must be dismissed. The State Defendants initially argue Rubin and Kamahele are immune under Haw. Rev. Stat. § 350-3(b) from civil liability for acts or omissions performed within the scope of their official duties. In making this argument, however, the State Defendants have failed to recognize that Plaintiff asserts no state cause of action against Rubin and Kamahele personally. Instead, Plaintiff's state causes of action are asserted against the DHS and the County.

The State Defendants then argue that no recognized tort of custodial interference exists. Plaintiff opposes, bringing forth case law in support of such a cause of action.

The State Defendants finally argue that Plaintiff cannot satisfy the elements of either his intentional or negligent infliction of emotional distress causes of actions. Plaintiff disputes their contention, asserting that he can satisfy the necessary elements of these causes of action.

II. FACTS

All parties agree that Plaintiff did not receive notice or an opportunity to be heard either before or after defendants removed Plaintiff's minor children from his custody. They also agree that in early June 1994, the prosecuting attorney decided to dismiss, with prejudice, the state criminal charges against Plaintiff. With the exception of these facts, the parties present different versions of the relevant events.

A. SILVA'S EVIDENCE

Defendant Silva presents a simple version of the facts. He claims that, on October 14, 1993, Plaintiff was indicted for sexually abusing Z.D., a 14-year-old boy living in Plaintiff's foster home, and that, as a result of the indictment, they removed Plaintiff's five adopted minor children, all of whom are boys under the age of 17, from his custody and put them into the temporary protective custody of the state. The indictment alleges that Plaintiff sexually abused Z.D. by touching Z.D.'s penis and buttocks.

B. PLAINTIFF'S EVIDENCE

Plaintiff presents a far more complicated version of the facts than Silva. Plaintiff's evidence depicts the following:

Z.D., a minor with a history of compulsive lying and stealing, was placed in Plaintiff's licensed foster home in November and December 1991 for three weekend visits because Z.D.'s foster parents needed a break from him. In January 1992, more than twenty months before Plaintiff's children were seized, Z.D. claimed Plaintiff sexually assaulted him during his weekend visits. Z.D. claimed Plaintiff touched his penis and buttocks. The DHS conducted an investigation of the allegations. In October 1992, about one year before Plaintiff's minor children were seized, the DHS conducted video-taped interviews of Plaintiff's minor and adult children. During the interviews, Plaintiff's children denied ever being sexually abused. They also denied that sexual abuse ever occurred in Plaintiff's home. The DHS also interviewed Z.D. and

Z.D.'s natural father. While being interviewed by CPS personnel about his allegations, Z.D. presented inconsistent stories. At one point, Z.D. stated that Plaintiff touched his penis and that one of Plaintiff's minor sons, referred to here as "X," had forced him to have anal sex. At another point, Z.D. stated that Plaintiff had never touched him sexually and that X had never touched him sexually. CPS Supervisor Peggy K. Hilton concluded and closed the DHS investigation with the following statement: "[W]e have concluded that [the allegations of Z.D. and Z.D.'s father] are not confirmed. We believe that after you review all of the videotaped interviews as well as carefully review all of the above findings, you, too, will conclude the same." CPS Official Report at 15 (Plaintiff's Exhibit C to Opposition to Silva's Motion for Partial Summary Judgment). Silva had Hilton's report before he decided to seize Plaintiff's children.

Detective Rockne Araujo, the HPD detective who investigated Z.D.'s allegations, also concluded that Plaintiff's children were not in immediate danger of sexual abuse from Plaintiff. At the time of his investigation in 1992, he concluded no need existed to taken [sic] the children into protective custody. When Silva made the decision to take the children into protective custody in October 1993, Silva called Detective Araujo into his office and told him to seize the children. At this time, Detective Araujo again informed Silva of his opinion that protective custody was not warranted.

Furthermore, Z.D. admitted lying about being raped by X. The county prosecutor knew about Z.D.'s admission sometime in mid-1993, prior to the time Plaintiff's

children were seized. While Silva does not admit knowing that Z.D. lied, he does state that he consulted the county prosecutor before taking the children into custody. From this fact, Plaintiff claims Silva's knowledge regarding Z.D.'s lie can be inferred.

During Silva's deposition, he stated that he relied on several items of evidence in deciding to seize the children, including the indictment, a March 1993 anonymous letter reporting allegations that an 11-year-old boy had been fondled by Plaintiff while in Plaintiff's home in August 1989, and June 1993 materials from the FBI reporting an investigation into allegations that Plaintiff was physically abusing his children and about an investigation into allegations of sexual impropriety between Plaintiff and one of Plaintiff's sons. Silva admitted learning about the August 1989 allegations when they were made in 1989. Silva also stated that he conducted no independent investigation regarding the FBI materials. Thus, except for the indictment, Silva had all the information upon which he relied to seize the children in June 1993, four months before he actually seized them.

As to the indictment, Silva admitted during his deposition testimony that the indictment itself did not put the children at any more risk. He stated that he did not know on what evidence the grand jury based its decision. In fact, the grand jury only had Z.D.'s original allegations before them as testified to by a detective establishing the time and place.

During Peggy Hilton's deposition, she stated that Silva informed her of his plan to seize the children. She opposed his plan and asked him why had decided to

seize the children. According to Hilton, Silva told her that he had been pressured into doing so by Bill Davis, the managing director of the County of Hawaii. As far as Hilton knows, Davis has no expertise in the child protective services area or any formal responsibilities in that area.

C. STATE DEFENDANTS' EVIDENCE

The State Defendants' evidence does not materially controvert Plaintiff's evidence relating to Silva's involvement in the decision to remove the children from Plaintiff's custody. Their evidence however does contain further details with regard to Kamahele's involvement. Plaintiff's evidence does not materially controvert the evidence offered by the State Defendants.

The State Defendants present the following version of Kamahele's involvement:

Shortly after Plaintiff was indicted, but before the police took Plaintiff's children into protective custody, Silva called Kamahele and informed her that the police planned to remove Plaintiff's children from his custody. Silva told Kamahele that, about four months before the indictment, he had received some FBI reports that tended to support Z.D.'s allegations of sexual abuse. Kamahele asked Silva to send the FBI reports to her, but Silva responded that he could not. He suggested that she perform an independent investigation of the allegations in the FBI reports by contacting state officials in California.

Kamahele called the state officials, and spoke with a Detective Richter and a Ms. Sebastian. Sebastian said that

she had investigated Ram about ten years ago. She said that, if she had known then what she knows today, she would have taken Plaintiff's boys into protective custody. Detective Richter said he was "on Mr. Ram's tail," but before he knew it, Plaintiff disappeared. She asked that the police reports containing the California allegations against Plaintiff be faxed to her.

The police reports show:

1. A 1986 complaint to the county sheriff of Tehama County from Susan Wallace regarding Plaintiff's foster home in California. She had lived there in 1983-84. She had heard from boys living there that Plaintiff was encouraging them to masturbate and that Plaintiff was having a homosexual relationship with a foster son named Y. Wallace related an incident when Y was sick with a bladder infection and, when examined by a doctor, was found to have fecal matter in his urinary tract. The sheriff did not investigate because Plaintiff had moved to Hawaii.

2. An undated advertisement indicating Plaintiff was running a "Youth Help Line" for runaways in California.

3. A 1983 report of an investigation initiated when Y, then a high school student, refused to go home because Plaintiff was constantly hitting him.

4. Another investigation, during which a teacher at the local high school reported that W, another of Plaintiff's foster sons, told her he had once received 12 enemas in one day from Plaintiff and that Plaintiff would sometimes slam Y's head against the wall. Y later reported that he had received 3 enemas himself one day, and agreed that Plaintiff slammed his head into the wall. V,

another of Plaintiff's foster sons, related that he received three or four enemas in a day and that he and one of his brothers had slept with Plaintiff and cuddled with him. Plaintiff was interviewed and did not substantially dispute either the enema practice or the sleeping arrangements, but denied that anything improper was happening.

5. Another 1983 report in which Y stated that his father hit him and school authorities had observed him with a "fat lip" and a "chipped tooth." His brother also said he felt Y was being beaten by Plaintiff.

Upon her discussion with the California officials and her review of the reports, Kamahele decided to involve the DHS in taking protective custody of the children so that she could perform a more detailed investigation. The police first took custody of the children on Friday, October 22, 1993, and then the DHS subsequently accepted custody from the police later that day. In her deposition, Kamahele admitted that, at the time the children were taken into protective custody, she had probably not decided that they were in immediate danger of sexual abuse from Plaintiff. Nevertheless, Kamahele believed that, under state law, she had two days to further investigate the matter before making such a determination. The deposition transcript provides:

Q. At the police station, did you decide that the Ram children were in a situation of imminent harm if they were returned to his home?

A. The call that I made was based on – I needed more time to make a decision, a definite decision, and the law provided me with 48 hours.

Q. So on – at anytime on the day they were taken, did you come to the conclusion that the Ram children were in fact in a situation of imminent harm if they were returned to his home that night or that afternoon?

A. As I said, I still needed time.

Q. So –

A. – to – to analyze whatever facts and evidence I had at the time.

Q. So is it fair to say that on the day the Ram children were taken into protective custody, you did not make a determination that they were in fact in a situation of imminent harm if they were returned to him?

A. At that point, probably not. But I needed to exercise, you know, the – the fact that I have this time to – to make a definite decision later.

Deposition of Elsie Kamahele at 74-75 (Exhibit A to Supplemental Memorandum in Support of State Defendants' Motion for Judgment on the Pleadings).

In the afternoon of Friday, October 22, 1993, Plaintiff filed for a temporary restraining order with the state family court, seeking the return of his children. The state judge refused to hear the matter that Friday, but set a hearing for the following Monday. On the following Monday, the judge denied Plaintiff's request to have the children returned.

By the following Tuesday, the DHS had finished interviewing Plaintiff's children. Kamahele concluded

that she would not be able to obtain sufficient information to file a petition in the state family court to permanently remove Plaintiff's children from his custody. Consequently, she released the children to Plaintiff that evening.

III. STANDARD OF REVIEW

As a preliminary matter, this Court determines the appropriate standard of review to apply to the motions here. Defendant Silva has filed a motion for partial summary judgment and therefore the Court will accordingly apply the summary judgment standard of review to his motion. The State Defendants have brought a Rule 12(c) motion for judgment on the pleadings. Under Rule 12(c), when a court considers matters outside the pleadings to decide a motion for judgment on the pleadings, the court must treat the motion as one for summary judgment. By way of its April 11, 1994 order, this Court notified the parties that it would be considering matters outside the pleadings in connection with the motion for judgment on the pleadings, and therefore would be treating it as one for summary judgment. The Court gave the parties time to submit evidence supporting and opposing the motion. Hence, this Court now considers the State Defendants' Rule 12(c) motion as one for summary judgment and applies the appropriate standard of review.

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). One of the principal purposes of the summary

judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 316, 323 (1986). The United States Supreme Court has declared that summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Id.* at 322. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T.W. Elec. Serv. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987). Instead, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. *Id.* At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987), *citing, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

In viewing the evidence produced by each party, however, the court must draw all reasonable inferences of fact in favor of the opposing party. *T.W. Electrical Serv. v. Pacific Elec. Contr. Assoc.*, 809 F.2d 626, 630-31 (9th Cir. 1987). Further, the court cannot resolve credibility disputes at this stage of the proceedings. *Anderson*, 477 U.S. at 249.

IV. DISCUSSION

A. SILVA'S MOTION

1. Legal standards for qualified immunity

Under the doctrine of qualified immunity, state officials are shielded from liability where their official conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The threshold determination of whether the law governing the official's conduct is clearly established is a question of law for the court. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (citing *Harlow*, 457 U.S. at 818). The determination of whether the facts alleged could support a reasonable belief that the official was acting lawfully is also a question of law to be determined by the court. *See Act Up!/Portland*, 988 F.2d at 868. If however genuine issues of fact exist preventing a determination of qualified immunity at summary judgment, the case must proceed to trial. *Id.*

Plaintiff claims Silva's conduct violated his constitutional interest, as a parent, in his children. He asserts that, given the lack of an emergency situation where the

children were in immediate danger, he was entitled to notice and an opportunity to be heard before the state removed his children from his care and custody. He claims the state's failure to provide notice and a hearing violated his due process rights under the Fifth and Fourteenth Amendments.

It is clear that a parent has a constitutionally protected interest in the custody and care of his or her children and that due process rights apply to this interest. *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Caldwell v. LeFaver,* 928 F.2d 331, 333 (9th Cir. 1991). It is also clear however that this interest is not absolute. *Caldwell,* 928 F.2d at 333. The Ninth Circuit has held: "In an emergency situation, a state agency may remove children from their parents' custody [without prior notice and hearing] when the children are subject to immediate or apparent danger or harm." *Id.* (citing *Baker v. Racansky,* 887 F.2d 183, 187-88 (9th Cir. 1989); *Myers v. Morris,* 810 F.2d 1437, 1463 (8th Cir.), *cert. denied,* 484 U.S. 828 (1987)).

Applying these principles to the case at bar, this Court holds that Plaintiff has a clearly established right not to have his children taken from his custody unless state officials have a reasonable belief that an emergency situation exists in that they reasonably believe Plaintiff's children are subject to immediate or apparent danger or harm. Hence, whether Silva is entitled to qualified immunity will turn on "the reasonableness of [his] belief that a sufficient emergency existed to warrant taking [Plaintiff's children] into temporary custody. This analysis is not one of hindsight, but rather is determined by [Silva's] action in the context of the circumstances with which [Silva] was confronted." *Doe v. Connecticut Dep't of Children & Youth*

Serv., 712 F. Supp. 277, 284 (D. Conn. 1989), *aff'd*, 911 F.2d 868 (2d. Cir. 1990).

2. **Application**

Silva argues that he had a reasonable belief that Plaintiff's children were in immediate danger of sexual abuse because Plaintiff had been indicted for sexually abusing Z.D., a 14-year-old boy who was living in Plaintiff's house. Although Z.D. was not related to Plaintiff, the fact that Plaintiff was accused of sexually abusing him created strong support for a belief that the five adopted minors, all of whom were boys under the age of 17, were in danger of sexual abuse.

If Silva only knew of the indictment and its allegations when making the decision to put Plaintiff's children in temporary protective custody, the Court would find Silva reasonably believed that a sufficient emergency existed to warrant removing Plaintiff's children from Plaintiff's care. Plaintiff presents evidence, however, which could support findings that Silva knew the children were not in immediate danger of sexual abuse and that Silva made the decision to seize the children because of political pressure, not out of concern for the children's welfare. This evidence includes, among other things, Hilton's CPS Official Report concluding Z.D.'s allegations of abuse were unconfirmed; Hilton's deposition testimony that she informed Silva that Z.D.'s allegations were unconfirmed and that no grounds existed for seizing the children; Detective Araujo's deposition testimony that he had informed Silva that his investigation revealed Plaintiff's children were not in immediate danger of sexual

abuse; Silva's deposition testimony that he did not further investigate the March 1993 anonymous letter or the June 1993 FBI materials; and Hilton's deposition testimony that Silva seized the children as a result of political pressure. Most telling is the fact that Silva did not decide to seize the children immediately after he had all the information upon which he relied to make his decision, but instead waited four months. This delay calls into question Silva's belief regarding the immediacy of any danger to Plaintiff's children. The delay also supports a finding that ample time existed to provide Plaintiff with prior notice and hearing. Silva relies on the indictment as providing the impetus for his decision, but admits that the indictment itself did not put the children at further risk. Furthermore, the determination of whether Silva's decision was based on a reasonable belief that an emergency situation existed will depend in large part upon a credibility assessment of all the witnesses. Given the foregoing, genuine issues of material fact exist which preclude this Court from now deciding whether qualified immunity bars suit against Silva.

This Court DENIES Silva's motion.

B. STATE DEFENDANTS' MOTION

1. § 1983 Claim

a. Eleventh Amendment

To the extent Plaintiff's § 1983 claim is asserted against the State of Hawaii, the claim is barred by the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332 (1979). Furthermore, to the extent Plaintiff's § 1983 claim

for damages is asserted against Rubin and Kamahele in their official capacities, the claim is barred by the Eleventh Amendment. *Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 101 (1984); *Mujahid v. Sumner*, 807 F. Supp. 1505, 1511 (D. Haw. 1992).

b. Absolute immunity

The Ninth Circuit holds that social workers are entitled to absolute immunity when performing "quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." *Meyers v. Contra Costa County Social Services*, 812 F.2d 1154, 1157 (9th Cir. 1987); *Caldwell v. Lefaver*, 928 F.2d 331, 333 (9th Cir. 1991). Social workers perform "quasi-prosecutorial functions" when they contribute as an advocate to an informed judgment by an impartial decisionmaker. *Caldwell*, 928 F.2d at 333 (citing *Meyers*, 812 F.2d at 1157). For example, if a social worker's actions aid in the preparation or presentation of a case to the juvenile court, absolute immunity applies. *See Caldwell*, 928 F.2d at 333 (citing *Meyers*, 812 F.2d at 1157). Also, if a social worker's actions are taken in connection with an ongoing child dependency proceeding, absolute immunity applies. *See Caldwell*, 928 F.2d at 333 (citing *Babcock v. Tyler*, 884 F.2d 497, 503 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990)). When an action seems designed to avoid adjudication of the custody issue, however, absolute immunity does not apply. *See Caldwell*, 928 F.2d at 333. In essence, when a social worker is not acting under the supervision of a court, qualified immunity, not absolute immunity, governs the question of whether the social worker is immune

from suit. *Id.* Thus, standards for qualified immunity, not absolute immunity, will determine whether a social worker is immune from suit for any actions taken before the initiation of child dependency proceedings. *Meyers*, 812 F.2d at 1157.

In the case at bar, Kamahele argues that she is entitled to absolute immunity because she was acting under the supervision of the state court. She claims she was acting under court supervision because she participated in the state court proceedings regarding Plaintiff's TRO seeking an order requiring defendants to return of his children.

Kamahele's argument lacks merit. The TRO hearing resulted from Plaintiff's efforts protesting the removal of his children, not from Kamahele's efforts to present a case to the juvenile court or her participation in an ongoing child depending hearing. The burdens and standards of proof are different in these proceedings. In the TRO proceedings, the burden was on the Plaintiff to prove he was entitled to such injunctive relief. If Kamahele had filed a petition with the family court, the burden would have been on her to prove that the state was entitled to remove the children from Plaintiff's custody. Thus, the kind of court supervision Kamahele received during the TRO process is significantly different from the kind she would have received in connection with a child dependency proceeding.

Further, Kamahele and the DHS never initiated child dependency proceedings. As Kamahele's actions did not aid in the preparation of a child dependency proceeding and were not taken in connection with an ongoing child

dependency proceeding, this Court finds that absolute immunity does not apply to the instant action. The standards governing qualified immunity will determine whether Kamahele and the DHS are immune from suit.

c. Qualified immunity

The standards for qualified immunity that apply to Silva, discussed in Part IV.A.1. of this order, also apply to the State Defendants. Moreover, with regard to the qualified immunity question, courts apply an objective standard – what would a reasonable official believe under the facts and circumstances known to the defendant at the time of his or her actions. Consequently, except insofar as they shed light on what a reasonable official might believe, the subjective beliefs of the defendant are irrelevant to the existence of qualified immunity. *DeNieva v. Reyes*, 966 F.2d 480, 486 (9th Cir. 1992) ("As [*Anderson v. Creighton*, 483 U.S. 635 (1987),] and [*Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991),] indicate, however, subjective good faith is irrelevant to the existence of qualified immunity (except insofar as it sheds light on what a reasonable officer might believe)."); *Bothke v. Fluor Eng'r & Constr., Inc.*, 834 F.2d 804, 811 (9th Cir. 1987) ("[The official's] subjective beliefs' about the lawfulness of her conduct are 'irrelevant.' [*Creighton*, 483 U.S. at 641.] 'As long as [the official's] actions could reasonably have been thought consistent with the rights they are alleged to have violated,' [the official] is immune from civil damages liability. [*Id.* 638.]"). Applying the objective standard to the case at bar, the fact that Kamahele has admitted that she had probably not made an assessment at the time

the children were taken into protective custody that they were in immediate danger of sexual abuse is not controlling as to this Court's resolution of the qualified immunity issue. Kamahele's admission may shed some light on whether a reasonable official in Kamahele's position would have made such an assessment. Nevertheless, the Court's focus in resolving the qualified immunity question will be on the facts actually known to Kamahele and the actions actually taken by her. If the facts known to her and the actions taken by her would cause a reasonable official to believe the children were in immediate danger of sexual abuse, then Kamahele is entitled to qualified immunity, despite any subjective opinion she may have had.

Kamahele's evidence with regard to the actions she took before taking Plaintiff's children into protective custody is significantly different than that of Silva, and entitles her to summary judgment on this issue. On the one hand, Silva took no action on the FBI reports, and only waited until Plaintiff was indicted to remove the children, even though he admits the indictment did not put the children in further danger. On the other hand, Kamahele only learned of the FBI reports when Silva called her after Plaintiff was indicted. As soon as she learned of the reports, she began an investigation. She called the California officials and spoke with two officials who had prior dealings with Plaintiff. She had the officials fax to her police reports regarding allegations of abuse by Plaintiff. The information she obtained through the conversations and reports, described in detail in Part II of this order, would cause a reasonable official in Kamahele's position to believe the children could be in immediate

danger of sexual abuse. Thus, Kamahele acted reasonably when she took the children into protective custody. The reasonableness of Kamahele's conduct is not abrogated by her later determination that she did not have sufficient evidence to initiate child dependency proceedings.

This Court finds that, given her investigation of the allegations in the FBI reports, a reasonable official in Kamahele's position would have believed that the children were in immediate danger of sexual abuse. Therefore, Kamahele is entitled to qualified immunity. The Court GRANTS the State Defendants' motion with regard to this issue.

2. State Causes of Action

a. Immunity under Section 350-3(b)

Haw. Rev. Stat. § 350-3(b) provides:

> Any individual who assumes a duty or responsibility pursuant to section 350-2 or chapter 587 [the Child Protective Act] shall have immunity from civil liability for acts or omissions performed within the scope of the individual's duty or responsibility. Nothing in this section shall limit the liability of the department, any other state agency, or any private organization for the conduct of individuals provided immunity herein.

The State Defendants assert that, under § 350-3(b), Rubin and Kamahele are protected from civil liability under any state-law causes of action.

A reading of Plaintiff's complaint shows that he is not asserting any state-law cause of action against Rubin

and Kamahele in their individual capacities. Plaintiff's state-law causes of action are asserted against the DHS and the County. Neither the DHS or the County is immunized under § 350-3(b), and therefore the Court need not rule on the State Defendants' assertions regarding § 350-3(b).

b. Intentional Infliction of Emotional Distress

In Hawaii, a plaintiff alleging intentional infliction of emotional distress must prove "(1) that the act allegedly causing harm is intentional; (2) that the act was unreasonable; and (3) that the actor should have recognized that the act was likely to result in illness." *Fraser v. Blue Cross Animal Hosp.*, 39 Haw. 370, 374-75 (1952); *Wong v. Panis*, 7 Haw. App. 414, 421 (1989). The Hawaii Supreme Court has equated the term "unreasonable" with the term "outrageous," meaning that the plaintiff must show the act was "without just cause or excuse and beyond all bounds of decency." *Chedester v. Stecker*, 64 Haw. 464, 468 (1982) (citing 1 Restatement (Second) of Torts § 46 (1965)). The initial question as to whether the conduct complained of is sufficiently outrageous and extreme to support recovery is for the court. Restatement (Second) of Torts § 46 cmt. h (1965). If reasonable persons could differ on the question, however, the issue should be left to the jury. *Marshall v. University of Hawaii*, 9 Haw. App. 21, 38 (1991).

The State Defendants assert that the allegations of the complaint fail to show that their behavior was outrageous, and therefore this cause of action must be dismissed. The Court agrees. The Court finds that, given her investigation of the allegations contained in the FBI

reports immediately before she removed the children from Plaintiff's custody, Kamahele did not act outrageously when she took the children into protective custody. The Court GRANTS the State Defendants' motions on the intentional infliction of emotional distress claim.

c. Negligent Infliction of Emotional Distress

To succeed on his negligent infliction of emotional distress claim, Plaintiff must show the State Defendants engaged in negligent conduct that caused (1) serious emotional distress to Plaintiff, and (2) physical injury to a person. *Calleon v. Miyagi*, No. 16261, 1994 Haw. LEXIS 30, *30-31 (Haw. May 10, 1991). This Court finds that, given her investigation of the allegations contained in the FBI reports immediately before she removed the children from Plaintiff's custody, Kamahele did not act negligently when she took the children into protective custody. Hence, the Court GRANTS the State Defendants' motions on the negligent infliction of emotional distress claim.

d. Tortious inference [sic] with custodial rights

In their motion, the State Defendants claim that Hawaii law does not recognize a cause of action for tortious interference with custodial rights, arguing that they have found no Hawaii case which has allowed such a claim. Plaintiff responds by claiming that, although no Hawaii case specifically recognizes such a claim, Hawaii law does not prohibit the claim. Plaintiff argues the issue is one of first impression, and, if the Hawaii courts were faced with the issue, they would recognize such a cause

of action because it is recognized in the Restatement of Torts (Second) § 700 ("Restatement § 700" or "§ 700")[1] and many jurisdictions have adopted § 700.

This Court need not address the issue of whether Hawaii courts would recognize a cause of action for tortious inference [sic] with custodial rights. Even assuming that such a claim exists, Plaintiff cannot prevail under the standards that he sets forth as applying to such a claim. Plaintiff states the following: "A government official can be liable in tort for interference with custody if the officer unjustifiably takes custody over a child in the course of investigating allegations of abuse or neglect. *McBride v. Magnuson*, 282 Or. 433, 578 P.2d 1259 (1978) (*en banc*)." As shown above, this Court has already found that Kamahele did not unjustifiably take custody of Plaintiff's children. Under the facts and circumstances known to Kamahele, a reasonable official in Kamahele's position had reason to believe that the children were in danger of immediate sexual abuse. Hence, the Court GRANTS the State Defendants' motion on this issue.

V. CONCLUSION

For the foregoing reasons, the Court DENIES Silva's motion and GRANTS the State Defendants' motion.

IT IS SO ORDERED.

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[1] Restatement § 700 provides: "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent."

DATED: Honolulu, Hawaii, JUL 25 1994.

/s/ Alan C. Kay
Chief United States District Judge

RAM v. RUBIN; CIV. NO. 93-917 ACK; ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

(2)

97-524

No. ~~97-542~~

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In The
Supreme Court of the United States
October Term, 1997

WILLIAM SILVA,

Petitioner,

vs.

JAY RAM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Jay Ram, respectfully prays that the Petition for Writ of Certiorari filed herein in behalf of William Silva be denied.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Hawaii was filed on July 25, 1994, and is reprinted in the Appendix to the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Ninth Circuit dated July 2, 1997, is reported at 118 F.3d 1306 and is reprinted in the Appendix to the Petition for Writ of Certiorari along with the denial of Petitioner Silva's request for rehearing and suggestion for rehearing en banc, dated August 14, 1997.

STATEMENT OF JURISDICTION

Respondent concurs that the Supreme Court has jurisdiction in this matter pursuant to 28 U.S.C. Section 1254.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

All of the relevant provisions are cited and have been accurately reproduced in the Petition for Writ of Certiorari.

STATEMENT

In January, 1992, it was reported that Respondent Jay Ram had sexually abused a minor, Z.D., during a weekend visit by Z.D. to Ram's foster home. After Z.D.'s allegations were investigated by both the State of Hawaii's Child Protective Service ["CPS"] and the Hawaii County Police Department it was determined that Z.D. was unreliable and probably untruthful, and the investigations were then suspended or closed. In September 1992, CPS was induced by apparent political pressures to reopen the case and conduct a second inquiry by a neutral investigator who had not been involved in the first investigation. The second CPS investigation – in which all of Ram's children were interviewed – also concluded with findings that the credibility of Z.D. was suspect and that there was "no conclusive evidence" or even "any strong indication" that sexual abuse had occurred.

Nevertheless, on October 14, 1993, Ram was indicted by a Hawaii County grand jury on Z.D.'s uncorroborated allegations that Ram had sexually assaulted Z.D. some twenty months earlier. The charges were dismissed, without any trial, in June, 1994.

In the meantime, on October 22, 1993, Petitioner William Silva, a Hawaii County police lieutenant, and Elsie Kamahele, a CPS supervisor, seized Ram's five adopted sons and one foster son without any indications that those six boys ever had been subjected to and/or threatened with any harm. Silva and Kamahele acted without any court order purportedly on the basis that Ram's indictment eight days earlier – for something that allegedly had occurred to Z.D. in January, 1992 – gave

them a sufficient basis for concern as to the current safety and well-being of Ram's minor children.

On October 26, 1993 the six children were returned to Ram, and this litigation ensued. Although there has not been and never will be any showing that Ram ever sexually abused Z.D. or any of his children (or anyone else, for that matter), Petitioner Silva has contended – thus far unsuccessfully – that for his actions he should be shielded by qualified immunity.

REASONS FOR DENYING THE WRIT

(1) Because Petitioner Silva knew or should have known that his seizure of Ram's children without a prior court order, and in the absence of any evidence that the children were in imminent danger, unreasonably violated even the "amorphous" and/or "nebulous" parameters of the right to family integrity, Silva is not entitled to qualified immunity as a matter of law.

(2) Because of the clear absence of any evidence or indication of imminent harm to Ram's children at the time of their seizure by Petitioner Silva, without a prior court order, this case is clearly distinguishable from and therefore consistent with every other reported case in which child care workers have been afforded the protection of qualified immunity in connection with their reasonable efforts to protect children who are or may be at risk.

(3) The opinion of the court below is in no way "discordant and inconsistent with" this Court's opinion

in *Behrens v. Peletier*, 516 U.S. ___, 116 S.Ct. 834, 113 L.Ed.2d 773 (1996), as alleged but not argued by the Petitioner.

I. QUALIFIED IMMUNITY DOES NOT EXTEND TO STATE OR LOCAL OFFICIALS WHO SEIZE CHILDREN WITHOUT A PRIOR COURT ORDER AND WITHOUT ANY EVIDENCE THAT THE CHILDREN ARE IN IMMINENT DANGER OF HARM.

In *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988), it was undisputed that the father was seen chasing his seven year old daughters with a chain and that severe bruises were found on the children before investigators took them – without a court order – for medical examinations. In *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), a medical doctor's clinical observations concerning recent sexual abuse and additional corroborating evidence from a psychologist tipped the balance against any clearly established constitutional right to the plaintiffs' care and custody of their children, free from interference by the state's child care workers, at the time of the alleged violations.

Finally, in *Foy v. Holston*, 94 F.3d 1528, 1534-1537 (11th Cir. 1996), there was evidence that a teenaged child claimed abuse by her parents, had bruises on her arm, did not wish to return to her family, and threatened suicide if she were compelled to return – all of which strongly indicated that the state child workers were "doing their jobs" in good faith when they placed the girl in foster care. Thus, in all of the cases cited and relied

upon by Petitioner there was abundant evidence that the children faced imminent harm which outweighed the admittedly "general formulation" of the claimed right to family integrity. See, e.g., *Hodorowski v. Ray, supra,* at 1217.

In the instant case there was absolutely no evidence of harm – past, present, or imminently in the future – to the children who were seized by Petitioner Silva. There were only stale allegations of harm to another child (Z.D.), which had been investigated and discarded on at least two prior occasions over a period of some twenty months. And there was an indictment eight days before the seizure which should have been followed immediately by an inquiry or seizure if, indeed, the indictment was a significant event that legitimately gave rise to any renewed concern about the safety and well-being of Ram's children. Unlike *Foy v. Holston, supra,* Petitioner Silva was not even arguably "doing his job" when he seized Ram's children without first seeking a court order under a state procedural statute that clearly was enacted to prevent the kind of abuse of family rights in which Silva deliberately and flagrantly engaged.

The mere fact that the asserted family rights may be somewhat generally defined and determined through a fact-laden balancing process does not entitle Silva to immunity for violating those rights merely by claiming that he was acting in the best interests of the children he seized. No court has ever extended the doctrine of qualified immunity quite that far. Indeed, despite even the most general formulation of rights any assertion of qualified immunity must be supported by sufficient evidence that the offending actions were within the scope of the

official's legitimate duties and concerns. But what competent police officer or child case worker ever reasonably could conclude under these peculiar and unique facts that his or her unilateral decision to seize Jay Ram's children on October 22, 1993, was necessary to protect the children from imminent harm? And what reasonable or competent police officer ever would effect such a seizure in the course and scope of his duties without first seeking the authorization of a judge or magistrate?

II. CONCLUSION

Because the seizure in this case was so outrageous and so clearly without justification it is submitted that any reasonable official balancing the assertion of family rights against the potential for harm to the children would and should have concluded that a seizure without prior court authorization was impermissible – as the respective courts below already have found. Accordingly this is not a case in which either the outcome or the reasoning process conflicts with or in any way is inconsistent with decisions elsewhere, and the Petition for Certiorari therefore lacks merit and should be denied.

DATED: Honolulu, Hawaii, November 24, 1997.

Respectfully submitted,

ERIC A. SEITZ
Attorney for Respondent

(3)

Supreme Court, U.S.
FILED
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No. 97-524

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM SILVA,

Petitioner,

vs.

JAY RAM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONDENT STATE OF HAWAII'S BRIEF

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In *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151 (1995), the Court held that a government officer's "evidence sufficiency" challenge to the denial of summary judgment in a qualified immunity case is not appealable. The Court of Appeals in the present case viewed Silva's appeal as presenting such a challenge. *Ram v. Rubin*, 118 F.3d 1306, 1311 (9th Cir. 1997), Petition Appendix ("App.") at 10.

The Court in *Johnson*, however, does not appear to have decided that a government officer cannot challenge the district court's denial of summary judgment on the ground that the assumptions it made about what information the officer pos-

sessed at the time the officer acted, *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987), were not supported by the summary judgment record. *See Johnson v. Jones*, 515 U.S. at ____, 115 S.Ct. at 2159. *See also Behrens v. Pelletier*, 516 U.S. ____, 116 S.Ct. 834, 842 (1996).

Such a challenge would not appear to compromise the collateral order doctrine. In discussing appealability under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court noted that *Mitchell v. Forsyth*, 472 U.S. 511 (1985), "rested upon the view that 'a claim of immunity is conceptually distinct from the merits of plaintiff's claim,' " even though it was "sometimes practically intertwined with the merits. . . ." 515 U.S. at ____, 115 S.Ct. at 2157. A government officer's challenge of the district court's legal question on the ground that it wasn't supported by the summary judgment record would not seem to undermine the conceptual distinctiveness of the district court's question.

Here, the District Court would have granted Petitioner's motion for summary judgment had Respondent Ram's evidence not suggested that Petitioner might have known the children were not in immediate danger and that Petitioner may have taken the children into custody because of political pressure and not concern for the safety of the children. App. at 32-33. *See* App. at 23-24. Thus, Petitioner was entitled to argue to the Court of Appeals that the summary judgment record before the District Court did not contain substantial evidence supporting the facts assumed by the District Court other than that the Petitioner knew about the Respondent's indictment and therefore that Petitioner was entitled to summary judgment.

The State of Hawaii is of the opinion that the Petition for Certiorari to this Court fairly includes such argument. The

State of Hawaii takes no position on whether the Petition should be granted.

Respectfully submitted

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